No.

405

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 405

JOHN W. TURNER, JR., *Appellant,*

vs.

ARREN E. WRIGHT, Treasurer of the State of Illinois and RICHARD J. LYONS, Director of the Department of Revenue of the State of Illinois,

Appellees.

MOTION TO DISMISS APPEAL

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JOHN W. TURNER, JR., *Appellant*,

vs.

WARREN E. WRIGHT, Treasurer of the State of Illinois and RICHARD J. LYONS, Director of the Department of Revenue of the State of Illinois,

Appellees.

MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF ILLINOIS

Pursuant to Rule 16(b) of the Revised Rules of the Supreme Court of the United States, appellees in the above entitled case move to dismiss the appeal on the ground that no substantial federal question is presented.

OPINION BELOW

The opinion of the Illinois Supreme Court sustaining the validity of the Use Tax Act is reported in 11 Ill. (2) 161, 142 N.E. (2) 84. The appellant has printed the opinion as Appendix C, pages 41-52 of the Statement As To Juris-

diction, so it will not be necessary to reprint the opinion in this brief. References to this opinion will be designated as App. C of appellant's brief.

QUESTION PRESENTED

Whether appellant's charge that Sections 3 and 9 of the Use Tax Act violate the 14th Amendment presents a substantial Federal question.

STATUTE INVOLVED

For the Court's convenience, the Illinois Use Tax Act (Pars. 439.1-439.18 Ch. 120, Vol. 2, pgs. 816-820, Ill. Rev. Stats. 1955) is reproduced in full as Appendix A to this brief. All references will be to the pages in the Appendix where the portion of the statute in question will be found.

STATEMENT

Nature Of Illinois Use Tax Act

The Illinois Use Tax Act was designed to and does complement the admittedly valid Retailers' Occupation Tax Act. Under the Use Tax Act, a tax is imposed "upon the privilege of using in this State tangible personal property purchased at retail * * * from a retailer." (Sec. 3, App. A, p. 35a.)

The Use Tax is imposed at the same rate as the tax under the Retailers' Occupation Tax Act. It applies whether the property is purchased in Illinois or elsewhere. Retailers are required to collect the tax from users by adding the tax to the selling price of the tangible personal property when it is sold for use. (Sec. 3, App. A, p. 35a.) It does not apply to out-of-state transactions that would not measure a tax under the Retailers' Occupation Tax Act if they occurred in Illinois, nor is it applicable to the use of property purchased outside of Illinois on which a sale or use tax has been paid to another State, to the extent of the tax so paid (Sec. 3, App. 36a).

In order to prevent double taxation i.e., the application of the Retailers' Occupation Tax and the Use Tax to the sale of the same tangible personal property, the Use

Tax Act provides in Sec. 9, App. A, p. 41a-42a for offsetting the taxes in question:

> "The first remittance shall be due on or before September 15, 1955, for the tax collected during the preceding calendar month, but a retailer need not remit that part of any tax collected by him to the extent that he is required to remit, and does remit the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property."

Further evidence of the complementary character of the two acts and the legislative intent that only one tax shall apply to any transaction is found in Sec. 3 of the Use Tax Act (App. A, p. 37a which provides:

> "If the seller of tangible personal property for use would not be taxable under the Retailers' Occupational Tax Act despite all elements of the sale occurring in Illinois, the tax imposed by this act shall not apply to the use of such tangible personal property in this State".

To prevent actual or likely multi-state taxation, the Act also affords adequate safeguards in this respect. Sec. 3, (App. A, p. 36a-37a), forbids the application of the tax in the following respects:

(1) Where a non-resident brings property into the State temporarily or while passing through the State;

(2) Where the property is acquired outside this State and is moved into this State for use as rolling stock moving in interstate commerce;

(3). Where a similar tax has been paid in another state to the extent of the amount of such tax so paid in the other state;

(4). Temporary storage of property acquired outside and brought in and used solely outside the State or attached to the property used solely outside the State.

ARGUMENT

NO SUBSTANTIAL FEDERAL QUESTIONS ARE PRESENTED BY THIS APPEAL

The Illinois Use Tax Act is not unique legislation in any respect. It was designed to and does complement the admittedly valid Retailers' Occupation Tax Act. The object and purpose of the Act is identical with the acts of many other states namely, to equalize the tax burdens which heretofore were unequal and discriminated against Illinois citizens and Illinois retail merchants as the Retailers' Occupation Tax Act, standing alone, could not reach out-of-state purchases and transactions in interstate commerce. (*Norton Co.* v. *Department of Revenue*, 405 Ill. 314, vacated and remanded *Norton* v. *Department of Revenue*, 340 U. S. 534)

As the Use Tax applies primarily to goods shipped into Illinois in interstate commerce and purchases of goods made outside the State for use within the State, the practical effect of this complementary taxing system is to afford the Illinois retail merchant some measure of protection against competition with out-of-state sellers not subject to a retailers' tax. Furthermore, it produces revenue for the State that would otherwise be lost. Thus protection of

the Illinois merchant is, in fact, protection also for the valid Retailers' Occupation Tax. If the Illinois retailer is forced out of business or deprived of part of his business by a tax that does not reach his out-of-state competitor this revenue is lost to the State. In addition, some Illinois citizens were not carrying their fair share of the State's tax burden as they made purchases in other states to avoid the payment of local retailers' tax. In fact, the transaction upon which this appellant was taxed clearly demonstrates this point. Appellant, here, bought and took possession of a motor vehicle in Indiana for use and not for the purpose of resale in Illinois (Abs. 2). He did not pay any tax in Indiana or in any other State with respect to the sale, purchase or use of the motor vehicle (Abs. 5). Under the terms of the Use Tax Act (Sec. 10, App. A, p. 44a-45a he was required to pay a tax directly to the Department of Revenue of the State of Illinois. He paid the tax under protest and brought this suit for recovery of a refund.

This Court has repeatedly sustained Use Tax Acts of other states based on this same scheme of complementary laws as not violating the commerce clause of the U. S. constitution. (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; *General Trading Co.* v. *State Tax Commission of Iowa*, 322 U. S. 335; *Nelson* v. *Sears Roebuck & Co.*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373.)

In *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, this Court sustained the validity of the use tax of the State of Washington, and approved its purpose and object, which is identical with the Illinois tax, by saying at page 581:

> "The plan embodied in these provisions is neither hidden nor uncertain. A use tax is never payable where the user has acquired property by retail purchase in the state of Washington, except in the rare instances in which retail purchases in Washington are not subjected to a sales tax. On the other hand, a use tax is always payable where the user has acquired property by retail purchase in or from another state, unless he has paid a sales or use tax elsewhere before bringing it to Washington. The tax presupposes everywhere a retail purchase by the user before the time of use. If he has manufactured the chattel for himself, or has received it from the manufacturer as a legacy or gift, he is exempt from the use tax, whether title was acquired in Washington or elsewhere. The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax, or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales. Do these consequences which must have been foreseen, necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?"

The appellant here does not challenge the validity of the instant tax on the ground that it violates the commerce clause of the United States constitution. In this connec-

tion, the Supreme Court of Illinois said, in its opinion sustaining the constitutionality of the Act: (App. C of appellant's br. p. 42)

> "The validity of the statute under the commerce clause of the Federal constitution is not challenged * * *."

In view of the previous decisions of this Court, and the lack of merit in appellant's specific contentions that the Use Tax Act violates the 14th Amendment of the United States constitution, this appeal should be dismissed. We will take up and dispose of appellant's specific contentions under Sees. A and B of this brief.

A.

Section 9 of the Illinois Use Tax Act does not violate due process requirements

The offsetting provision in Section 9 of the Illinois Use Tax Act (App. A, p. 41a-42a) does not result in a gift of public funds for a private purpose and does not constitute a taking of private property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. Appellant's criticism of the offsetting provision in question stresses form and ignores substance. To understand the purpose and effect of the challenged provision which allows retailers who collect the Illinois use tax from purchasers to retain that tax to the extent to which they are liable for and pay the tax that is imposed by the Illinois

'Retailers' Occupation Tax Act,' it is first necessary to understand the peculiarities of Illinois constitutional law. The adoption of the kind of Use Tax Act that has been adopted in Illinois was necessary before we could have a use tax which would complement the Illinois retailers' occupation tax and still satisfy the uniformity requirements of the Illinois Constitution, as construed by the Illinois Supreme Court. It is also important to have a clear picture of the mechanics and the operation of the Illinois Use Tax Act and its relation to the Illinois Retailers Occupation Tax Act.

The use tax is levied on the purchaser. In some cases, it must be collected from the purchaser by the seller. In other instances, the purchaser must pay the tax directly to the Department of Revenue. The use tax is aimed primarily at out-of-State purchases where the property will be used in Illinois, but where the seller cannot be taxed under an occupation tax law because of interstate commerce. The use tax complements the occupation tax which is imposed by the Retailers' Occupation Tax Act and which applies to persons engaged in the business of selling tangible personal property at retail in Illinois. The function of the use tax is to equalize the situation so that there is no legally known tax advantage in buying goods outside Illinois because of the existence of the retailers' occupa-

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Ill. Rev Stats., 1955, Ch. 120, Pars. 440-453.

tion tax. This protects Illinois revenues and Illinois retailers without giving local retailers any tax advantage over out-of-State sellers since the use tax rate and the retailers' occupation tax rate are the same—2½% of "gross receipts" or "selling price".[2] However, in addition to placing the legal burden of the use tax on users who do their buying from retailers outside Illinois, it has been necessary to impose the tax on users who make similar purchases in Illinois in order to satisfy the Illinois constitutional requirement of uniformity by placing the legal burden of the tax on all users who buy at retail from retailers. This was the setup that resulted in the Cigarette Use Tax Act[3] being held valid in 1952.[4] When the Motor Vehicle Use Tax subsequently deviated from this pattern and taxed only users buying outside Illinois, the Illinois Supreme Court held that Act unconstitutional as violative of the uniformity requirement of Section 1 of Article IX of the Illinois Constitution.[5] Thus it can be seen that it

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[2] Ill. Rev. Stats., 1955, Ch. 120, Pars. 439.3 and 441.

[3] Ill. Rev. Stats., 1955, Ch. 120, Pars. 453.31 et seq.

[4] *Johnson v. Halpin et al.*, 413 Ill. 257, 108 N.E. (2d) 429—Certiorari denied—345 U. S. 923, 73 S. Ct. 781, 97 L.ed. 668. This case involved the Cigarette Use Tax Act which complemented the Cigarette Tax Act (an occupation tax on a class of sellers) in exactly the same way that the present Use Tax Act complements the Retailers' Occupation Tax Act, and the Illinois Supreme Court said that the Cigarette Use Tax Act is a complementary Act and does satisfy constitutional requirements of uniformity.

[5] *People v. Carpentier*, 2 Ill. (2d) 468, 118 N.E. (2d) 815. At pages 475 and 476 in 2 Ill. (2d), the Illinois Supreme Court said:

> "It is contended that this tax is similar to that in the Cigarette Use Tax Act and that the act is valid as levying a complementary tax to that levied by the Retailers' Occupation Tax Act. Our decision in *Johnson v. Halpin*, 413 Ill. 257, is cited in support of this contention. That case can offer no such support as it is evident that there is a salient difference between the Motor Vehicle Tax Act and the Cigarette

would be impossible under the Illinois Constitution to follow appellant's suggestion of adopting, in Illinois, exactly the same form of complementary Use Tax as several other states have adopted, so the Illinois General Assembly sought to accomplish the same total legal and economic effect in making the present general Use Tax Act complement the Retailers' Occupation Tax Act by following the mechanical pattern that it had employed successfully in the case of the Cigarette Use Tax Act.

The result of taxing local purchases at retail as well as similar out-of-State purchases is that the use tax has simply been superimposed on the retailers' occupation tax. To prevent tax pyramiding by having both the retailers' occupation tax and the use tax collected by the State on Illinois sales, the Use Tax Act contains an offsetting provision like that in the Cigarette Use Tax Act.[6] 'The retailer must collect the use tax, but then keeps it to the extent that he is liable for retailers' occupation tax on the

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Use Tax Act. A review of the statutes will reveal that the former (by the Secretary's construction) provides for no general tax upon all users of motor vehicles in this State. If the Retailers' Occupation Tax Act were repealed or substantially changed those who bought motor vehicles from Illinois dealers would escape the burden of this use tax. However, as pointed out in *Johnson* v. *Halpin*, 413 Ill. 257, the cigarette use tax is 'a tax on the local use of cigarettes and in no way discriminates against purchasers who buy their cigarettes outside of the State, since they pay the same tax as purchasers from Illinois distributors. There are no offset credit provisions for payment of the retailers' occupation tax against the payment of the use tax; there are no requirements that the former tax be paid. If an Illinois dealer fails to remit the occupation tax it will not prevent the Illinois purchaser from getting his certificate of title or license plates. These discriminatory features point up the decided lack of equality and uniformity required by both State and Federal constitutions. . . .'

[6] Ill. Rev. Stats., 1955, Ch. 120, Par. 453-33.

same transaction. The retailer still pays the retailers' occupation tax to the State; but instead of passing on that tax to the purchaser as most retailers used to do, the retailer now reimburses himself for the retailers' occupation tax by collecting and retaining the use tax.

There will be many out-of-State retailers who must collect the use tax in situations in which the seller is not liable for retailers' occupation tax because of interstate commerce. In that case, the retailer must remit the use tax to the State since he will not be paying, on the same transaction, retailers' occupation tax which he can offset against the use tax that he collects. This will happen, for example, where the seller has nothing here but soliciting agents. Such seller must collect the use tax according to this Court (*General Trading Company* v. *State Tax Commission of Iowa*, 322 U. S. 335), but would not be liable for retailers' occupation tax (*Norton Company* v. *Department of Revenue*, 340 U. S. 534). Similarly, a seller with a taxable retail outlet in Illinois is not liable for retailers' occupation tax on independent sales which are strictly interstate mail transactions (*Norton Company* v. *Department of Revenue*, 340 U. S. 534). However, such seller is required to collect the use tax on the interstate mail transactions (*Nelson* v. *Sears, Roebuck & Company*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Company*, 312 U. S. 373). Even out-of-State sellers who have nothing

here (no office or other facilities, no goods and no agent) can voluntarily obtain a permit to collect the use tax under the statute, although such a seller cannot legally be compelled to collect the tax (*Miller Brothers Company* v. *State of Maryland*, 347 U. S. 340). Whenever possible, the procedure is to have the seller collect the use tax from the purchaser; but if the purchaser makes an out-of-State purchase from a seller who is neither required nor authorized to collect the use tax, the purchaser is required to pay the use tax directly to the Department, (Sec. 10, App. A, p. 44a).

The foregoing picture of the Illinois tax setup as compared with what it would be without the use tax should make it eminently clear that the Illinois use tax does serve both the purposes which it should serve according to appellant's argument and according to *Miller Brothers Company* v. *State of Maryland*, 347 U. S. 340.

Appellant places great relaince on the belief that since 28 states make the use tax complement a local tax in a certain way (ie., by taxing only purchases made outside the state since the local tax already applies to similar purchases made within the taxing state), another mechanical process (that of Illinois) which accomplishes the same result is necessarily not "complementary". In most other states, the local tax (a sales tax) is already laid on the purchaser, with the retailer being a tax collector for the state. (A detailed listing of such states, with citations,

will be found in Appendix B to this motion.) Therefore, in those states, the use tax need only tax purchasers who buy outside the state from retailers in order to cause intrastate and similar out-of-state buying to be taxed. Since the retailers' occupation tax is on the seller, the Illinois use tax had to go a step further to complement the retailers' occupation tax and supply the deficiency of placing the legal burden of a tax both on purchases within Illinois from retailers and on purchases outside Illinois from retailers, as the uniformity requirement of the Illinois Constitution necessitates according to the Illinois Supreme Court. (*People* v. *Carpentier*, 2 Ill. (2d) 468.) However, when the retailers' occupation tax and the use tax are put together and the offsetting provision in the Use Tax Act is taken into consideration, the overall legal and economic effect is the same as that in other states (i.e., purchases at retail from retailers are taxed whether such purchases are made in the taxing state or outside such state).

In determining the nature of a state tax and constitutionality of the statute imposing it, the Court must regard substance rather than form and the controlling test is found in the operation and effect of the statute as applied and enforced. (*St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 362) The appellees submit that this Court should be more concerned with substance and effect than with form and mechanical procedures. If results are viewed,

rather than the mechanical procedures by which those results are achieved, the Illinois situation with the use tax is not different from that in other states which have use taxes, and the Illinois use tax is just as complementary as that of any other state. Such differences in mechanics as do exist are the result of the difference between the basic taxes that are being complemented (an occupation tax on the retailer in Illinois, and sales taxes on purchasers in most other states), but the Illinois result is the same as that achieved by other states without imposing their use taxes on purchases that are made at retail from retailers within the taxing states.

It may be well and good for appellant blandly to suggest that all the Illinois Legislature has to do in order to have a valid use tax is to levy the tax merely on purchasers who buy at retail from retailers outside Illinois, but that unfortunately is simply not true, as *People* v. *Carpentier*, 2 Ill. (2d) 468 conclusively shows. The only other known way by which to get the same result that other states have achieved is to adopt the mechanical setup which the present Illinois Use Tax Act has adopted, and which was successfully used and sustained by the Illinois Supreme Court in the case of the Cigarette Use Tax Act in *Johnson* v. *Halphin et al*, 413 Ill. 257.

Appellees believe that the Illinois Supreme Court dealt effectively in its opinion in this case with appellant's con-

tention that the Illinois Use Tax Act is not a complementary law, and that the offsetting provision in Section 9 of that Act constitutes a gift of public money for private purposes, in the following excerpt from the Court's opinion: (App. C of appellant's br. p. 44-46.)

> "While the plaintiff concedes that the constitution does not prohibit the imposition of a complementary use tax, he argues that the present statute is invalid. He points to the fact that other States that have use taxes impose them only upon the purchase of property outside the State for use within it, and he argues that the Illinois tax is not complementary because it falls upon purchases made within the State as well as upon those made outside, and thus introdues a new tax upon domestic transactions. The act requires the Illinois retailer to collect the use tax upon the sales he makes. It does not require him to remit that tax to the State, however, to the extent that he remits the retailers' occupation tax with respect to the sale of the same property. (Section 9.) Plaintiff also contends that this setoff provision provides for a gift of public funds to private individuals, permits the commutation of taxes and provides for the cancellation of a debt due to the State, all in violation of the constitution. Const., art. IX, secs. 6 and 7; art, IV, sec. 23.
>
> "The statute provides for a use tax that falls alike on those who purchase at retail within the State and those who purchase outside of it. That tax is to be collected by the Illinois retailer, but to the extent that he remits the tax due under the Retailers' Occupation Tax Act he is not required to remit the tax due under the Use Tax Act. The tacit assumption of the statute is that by this mechanism the tax advantage that was enjoyed by the buyer who purchased outside the State will be eliminated, without increasing the burden upon the buyer who purchases within the State. The accuracy of that assumption is not challenged. The Illinois retailer is required to remit one

tax of 2½ per cent with respect to each sale within the State. That is the same tax that is levied with respect to each out-of-State purchase for use within the State. It is true that the scheme of this tax is more complex than that of a use tax that falls only on out-of-State purchases. But its purpose and its results are those of the typical use tax, and the formal differences in the method by which those purposes are accomplished do not affect the validity of the statute.

"It is not intended that both taxes shall reach the treasury with respect to a single transaction. It is intended and provided that one tax, and only one, shall reach the State treasury with respect to each purchase of property for use within the State, whether or not the purchase is made within Illinois. To that end the statute provides that the use tax collected by the retailer does not constitute a debt owed by him to the State when he is relieved of the duty of remitting such tax to the Department by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction.' (Section 8.) *Only if the way in which the two taxes are interrelated is ignored is it possible to say that there is here a gift of public funds, commutation of taxes, or the cancellation of a debt owing to the State. The method by which the two taxes are integrated may be cumbersome, but it is not unconstitutional.*" (Underlining supplied.)

When the true purpose and function of the offset provision in Section 9 of the Illinois Use Tax Act is thus understood and considered, it should be apparent that the object of that purpose is a public purpose and that it does not result in a gift of public funds for a private purpose. Therefore, no private property is being taken without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

On Page 16 of its Statement As To Jurisdiction, appellant seeks to make capital out of the fact that Illinois retailers remit the retailers' occupation tax to the State and keep the use tax which they collect by way of reimbursement, whereas out-of-State retailers who are exempt from the retailers' occupation tax because of interstate commerce, but who are required or authorized to collect the use tax, actually remit the use tax which they collect to the State since they have no offsetting retailers' occupation tax liability by which to reduce such use tax remittance to the State. Appellant says that the offsetting provision is solely for the benefit of the Illinois retailers. As a matter of fact, it is not for the *benefit* (meaning profit or financial gain) of anyone, but is simply aimed at preventing two taxes from reaching the State Treasury on Illinois sales. Illinois retailers are no better off because of the offsetting provision than out-of-State retailers who collect the use tax and actually remit it to the State. Since the rate of the retailers' occupation tax and the rate of the use tax are the same (2½%), the tax collected and paid to the State by the out-of-State retailer is the same in amount as the tax collected and the tax paid to the State by the Illinois retailer. The only difference lies in the caption or designation under which the retailer remits the tax to the State. The out-of-State retailer remits it as use tax. The Illinois retailer remits it as retailers' occupation tax.

For such informational value as it may be, appellees wish to point out certain consequences which will result as a practical matter if the offsetting provision is invalid. In that event, it would be a practical impossibility to have a use tax in Illinois because we cannot, for Illinois constitutional reasons, simply tax users who do their buying outside Illinois while exempting users who do their buying from retailers in Illinois, (*People* v. *Carpentier*, 2 Ill. (2d) 468), and the Legislature cannot risk repealing the Retailers' Occupation Tax Act and substituting a Use Tax Act like the present one except for omitting the offsetting provision without being able to determine in advance that such Use Tax Act would be held constitutional on all counts in the specific form in which it might be enacted. Also, invalidation of the Use Tax Act on this ground would mean that the Illinois Cigarette Use Tax Act is likewise unconstitutional since it is dependent upon the same kind of procedure for the accomplishment of its purpose of complementing the Illinois Cigarette Tax Act.[7]

Appellant's argument concerning due process rests solely on a matter of statutory form and completely ignores substantive consequences. Since (as appellant concedes) this Court has many times upheld state use tax laws in relation to due process and other Federal Constitutional objections, and since the total legal and economic effects of

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[7] Ill. Rev. Stats., 1955, Ch. 120, Pars. 453.1-453.30.

the Illinois statutory setup by which the Illinois Use Tax Act complements the Illinois Retailers' Occupation Tax Act are not different from those effects which other states have achieved by a different procedure or mechanical process, appellees submit that the appellant's attack upon the offsetting provision in Section 9 of the Illinois Use Tax Act fails completely to present any Federal question of substance or merit.

B.

Validity of basic classification of the Use Tax Act in relation to the Fourteenth Amendment of the Constitution of the United States

Section 3 of the Illinois Use Tax Act, in exempting purchases at retail in kinds of transactions in which the seller would not incur retailers' occupation tax liability if all elements of the sale occurred in Illinois, does not create a discriminatory classification in violation of the Fourteenth Amendment of the Constitution of the United States. If a Use Tax Act is to complement a sales tax law or an occupation tax law, it is not unreasonable for the Use Tax Act to be predicated on the same classification (and therefore to contain the same exemptions) as the law that is being complemented. On the contrary, no matter what the exemptions in the law that is being complemented may be, it is entirely logical for the complementing statute to

contain the same exemptions except for the loophole or loopholes which the complementing statute is designed to close. A use tax act is generally aimed only at broadening the tax base to the extent of closing an interstate commerce loophole (i.e., to the extent of taxing out-of-State purchases that cannot be reached under the sales tax or occupation tax law that is being complemented) and (in the case of the Illinois Constitution, because of the State Court's interpretation of it) to the extent necessary to tax the same kinds of purchases when made in Illinois since the retailers' occupation tax (unlike the sales taxes of most states) does not technically and legally fall on the buyer when he does his buying in Illinois. However, there is no constitutional requirement which would make it necessary for the Illinois use tax to go further and attempt to tax kinds of transactions (such as isolated or occasional sales made by persons who are not retailers; sales that are incidental to the seller's engaging in a service occupation, etc.) which are not subject to the Illinois Retailers' Occupation Tax Act— the law that is being complemented. In the required respects, the Illinois Use Tax Act is complementary except in an immaterial, nondiscriminatory respect as to the value of trade-ins, which will be discussed more fully herein later.

On the question of classification, which can come into question in relation to the "equal protection" clause of the Fourteenth Amendment of the Constitution of the United

States, this Court has often held that it will not disturb the State Legislature's establishment of a classification unless the distinctions resulting from the classification are so arbitrary and unreasonable as to have no apparent basis in fact. For example, see *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, in which this Court upheld the action of the Pennsylvania Legislature in classifying bituminous coal differently from anthracite coal for tax purposes. Although both items are coal, the Court pointed out that there are differences in the physical properties and the uses of the two types of coal and that this would be sufficient to justify the Legislature of Pennsylvania in imposng a tax applicable to the one type of coal, but not applicable to the other. The Court made it clear that it would not disturb the classification made by a State Legislature for tax purposes unless the classification was so arbitrary and unreasonable as to have no apparent basis in fact whatever. There is nothing arbitrary or unreasonable about exempting purchases from sellers who are not retailers from a Use Tax Act which seeks to complement a tax law whose scope is limited to the taxation of sales that are made by retailers. On the contrary, it would be unreasonable to demand that the complementing use tax reach out and tax kinds of uses which are not within the statute that is being complemented when a question of its application to a seller who makes sales for use arises.

The Illinois Supreme Court justified the classification by which the Illinois Use Tax Act does not tax every conceivable kind of use (but seeks only to tax the kinds of transactions—purchases at retail from retailers—which are subject to the retailers' occupation tax when the question of the seller's tax liability on an Illinois sale is involved) in the following language: (App. C of appellant's br. p. 47-48.)

> "There are actions that the retailers' tax does not reach, because although they involve the physical transfer of personal property at retail, the element of service is so pronounced that it has been thought to dominate the element of sale. (See, e.g., *Mahon* v. *Nudelman*, 377 Ill. 331; *Huston Brothers Co.* v. *McKibbin*, 386 Ill. 479.) The use tax also exempts these transactions, and plaintiff argues that because it does so it is unconstitutional. While the distinctions that have been drawn are admitted to be relevant to an occupation tax upon retailers, they are said to be irrelevant, and therefore arbitrary and discriminatory, when included in a tax that falls upon the privilege of using property purchased at retail.
>
> "The argument would, we think, be persuasive *if the use tax stood alone*, for so far as use by the purchaser is concerned there is no distinction between a tailormade suit of clothes, for example, and one purchased at retail. But the tax before us does not stand alone. *It is designed to complement and to protect the tax imposed upon the occupation of selling at retail, and the validity of its exemptions is to be determined in the light of that purpose.* The question here is not whether the legislature *is required* to shape the use tax that it imposes to conform to the tax upon retailers, but whether it *may constitutionally do so*. We think that it may. The purpose of the use tax is to protect the base of the retailers' tax and the classification adopted is reasonably directed to this end. Whether the General Assembly could go further and broaden

the base of the use tax beyond the limits of the occupation tax upon retailers is not before us." (Underlining supplied.)

Appellant does not contend that the classification in question in Section 3 of the Illinois Use Tax Act would be discriminatory in violation of the Fourteenth Amendment of the Constitution of the United States if it should be determined that the Illinois Use Tax Act is complementary to the Illinois Retailers' Occupation Tax Act. What appellant does contend is that the Illinois Use Tax Act is not in fact a complementary statute. Appellant bases this contention on the ground that the Illinois Use Tax Act taxes domestic purchases at retail as well as out-of-State purchases at retail instead of following the pattern in other states of exempting domestic purchases at retail from the use tax and taxing only out-of-State purchases at retail. We believe that we have fully explained and answered this point in the preceding section (Section A) of this motion wherein we explained that this added feature of the Illinois Use Tax Act (though largely a matter of form) is necessary to satisfy the Illinois Supreme Court's construction of the uniformity requirement of the Illinois Constitution. It seems clear, as a matter of substance, that the Illinois Use Tax Act does not fail to qualify as a complementary statute for this reason since the total legal and economic effect of the Illinois Retailers' Occupation Tax Act

and the Illinois Use Tax Act are not different from that which obtains in other states.

Appellant's other reason for believing that the Illinois Use Tax Act is not, in substance, a complementary statute is that, where traded-in property is a part of the consideration for a sale, the use tax applies to more of the selling price than the retailers' occupation tax does because the use tax applies to the receipts in money plus the value of the trade-in, whereas the retailers' occupation tax applies only to the receipts in money. It is erroneous for appellant to argue that this produces any difference in the tax rates under the two statutes. The rate of tax under the Retailers' Occupation Tax Act is 2½%, and the rate of tax under the Use Tax Act is 2½%. (Sec. 3, App. A, p. 35a.) The difference between the amount of the use tax due and the amount of retailers' occupation tax due on a transaction involving a trade-in is not due to any difference in the tax rates under the two statutes, but results simply from the fact that a larger part of the selling price is subject to the use tax in such a case than is subject to the retailers' occupation tax. However, this produces no discrimination and does not result in any financial gain to any private person. If the user makes his purchase outside Illinois from an unregistered seller, so that he pays the use tax directly to the State, he will pay 2½% of the full selling price

(money paid plus the value of the trade-in). If the user makes his purchase from a registered retailer, he will pay the same amount of use tax to the seller. The seller is required by Section 9 of the Use Tax Act to remit the use tax that he collects to the State except to the extent that he has an offsetting retailers' occupation tax liability on the same transaction. In such a case, the retailer would pay 2½% of the receipts in money to the State as retailers' occupation tax, and he would pay 2½% of the value of the trade-in to the State as use tax. But the State would get all of the tax (2½% on the full selling price, including the receipts in money and the value of the trade-in), and the user would pay the same amount of tax whether he pays the tax to the State or to the retailer.

In its opinion in this case, the Illinois Supreme Court pointed up the foregoing explanation in the following passage which appellant quoted in the Statement As To Jurisdiction as far as the reference to the fact that the use tax on the example given would be $75.00 and the retailers' occupation tax would be $50.00, but which appellant did not see fit to finish: (App. C of appellant's br. p. 46-47)

> "There is, however, one respect in which the use tax does not precisely complement the retailers' occupation tax. The former tax is based upon 'selling price,' the latter on 'gross receipts' from sales. 'Selling price' is defined in both statutes to mean the consideration for a sale valued in money whether received or paid in money or otherwise, 'including cash, credits,

service and property of every kind or nature * * *.' (Ill. Rev. Stat. 1955, chap. 120, pars. 439.2, 440.) By an amendment in 1955, however, the definition of 'gross receipts' in the Retailers' Occupation Tax Act was amended so that it 'means the total selling price * * *, excluding therefrom any amount allowed as credit for tangible personal property taken in trade.' (Ill. Rev. Stat. 1955, chap. 120, par. 440.) The result of this discrepancy in definitions is that in cases in which property is received in trade as a part of the purchase price, the tax due may not be the same under the two statutes. For example, if a new car is purchased for $3000 and the buyer's old one is received in trade at $1000, the use tax will be $75. Under the Retailers' Occupation Tax Act, however, the value of the old car would not be included in the 'gross receipts' on which the tax is computed, so that the tax would be $50. 'The retailer, however, is required to remit to the Department the full $75, because he is excused from remitting the use tax that he collects only to the extent that he remits the retailer's tax with respect to the same transaction.' No discrimination between purchasers is involved in this situation, because each purchaser is required to pay the same amount as every other purchaser. And there is no unjust enrichment of the retailer, for he is required to remit to the Department the full amount that he has collected. That the two taxes are not precisely identical therefore deprives no one of any constitutional rights."

Consequently, there is no substance to appellant's argument that the slight difference between the Illinois Use Tax Act and the Illinois Retailers' Occupation Tax Act in the treatment of trade-ins is material enough to prevent the two Acts from being complementary, or that the difference produces any harm or discrimination or deprives anyone of any rights.

For the reasons given, it seems clear that the Illinois Use Tax Act does complement the Illinois Retailers' Occupation Tax Act in all material respects. If so, by appellant's own theory, the classification by which the Use Tax Act taxes only those users who purchase at retail from retailers is reasonable in relation to the Act's purpose of complementing the Illinois Retailers' Occupation Tax Act which is founded on the same classification when the question of the seller's liability on an Illinois sale arises. Consequently, there is no substance or merit to appellant's contention that this classification in Section 3 of the Illinois Use Tax Act results in a discriminatory classification in violation of the Fourteenth Amendment of the Constitution of the United States, so appellant's contention wholly fails to present any substantial Federal question.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this appeal from the judgment of the Supreme Court of Illinois should be dismissed as it does not present a substantial Federal question for the decision of this Court.

Respectfully submitted,

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